

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VOTER REFERENCE FOUNDATION, et al.,

Plaintiff,

VS.

NO. CV 22-00222 JB/KK

Hector Balderas, Attorney General
for the State of New Mexico, et al.,

Defendants.

FINAL TRANSCRIPT

ZOOM HEARING

Transcript of Motion for Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on August 31, 2022.

For the Plaintiff: Mr. Eddie Greim; Mr. Carter
Harrison

For the Defendant: Ms. Olga Serafimova; Mr. Dylan
Lange

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EXHIBIT

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1 make that representation, I might agree with you that
2 the need for a injunction is unnecessary, and then
3 also the need for -- a stay might be appropriate if
4 there is no need for an injunction. Is the Attorney
5 General interested in making that representation?

6 MS. SERAFIMOVA: Well, Your Honor, we would
7 be -- I think we would consider making that
8 commitment if Voter Reference would, in exchange,
9 agree to take down the voter data from their website.

10 THE COURT: I doubt Voter Reference is
11 going to make that deal. So if they don't make that
12 deal, is the Attorney General unable or unwilling to
13 make the representation that it will not prosecute
14 during the pendency of either the case or the appeal?

15 MS. SERAFIMOVA: Well, obviously, I -- you
16 know, that's a decision for my client that I cannot
17 make for them on the spot. But at the same time the
18 question comes up: Why would we agree to do that?
19 If we're not -- if there is no compromise on the
20 table, why would we agree?

21 We do believe, again, as explained in the
22 motion, we do believe that legally we're both
23 required to and entitled to prosecute anyone for
24 violating the New Mexico Election Code. And it's our
25 position that the injunction preventing us from doing

1 Reference Foundation to the Secretary of State's
2 Office, and our denial of that request, meaning the
3 Secretary of State's denial. The request said -- and
4 again, we are just relying on the language in the
5 letter that Mr. Greim submitted -- the request said:
6 Some information will be uploaded to the website, but
7 voters' personal data or personal information will
8 not be uploaded until we get an order by the Court.

9 And, of course, they don't tell us what
10 they consider to be personal information. And in any
11 event, the statute, 1-4-5.5 says -- I'm sorry, 5.6 --
12 says that it is unlawful to upload any voter data.
13 Not personal information of voters, not whatever
14 Voter Reference Foundation may think should be
15 confidential, but voter data. And voter data is a
16 defined term, and it says, "Any information derived
17 from the registration, certificate." And so
18 essentially in their letter, Mr. Greim let us know in
19 no uncertain terms that they intend to upload some
20 voter data as that term is defined under New Mexico
21 law.

22 And so we let them know that we cannot
23 provide the voter data because it would be a
24 violation of 5.6 for them to upload it. And if we
25 know that they intend to do that, that's essentially

1 that participants in the program disclose to -- we
2 don't know whom on their end -- the fact that they're
3 in the program. That person now has that knowledge.
4 They are responsible to take them down off the
5 website. But there is no -- we don't know what kind
6 of security requirement they have, if any. They
7 could be hacked at any point, for example. And the
8 identities of these individuals could become public,
9 and so on.

10 And so this is simply not workable. This
11 website is problematic on so many levels. And we do
12 feel that the public interest factor does weigh
13 strongly in staying the injunction until, again, we
14 have a final decision on the law by the Court of
15 Appeals.

16 And I'm happy to answer any other questions
17 that the Court might have.

18 THE COURT: Let's go back to that first
19 point about the merits. Are you saying that there is
20 no prior restraint because there is no threat of
21 prosecution?

22 MS. SERAFIMOVA: No, Your Honor. I am
23 saying there is no prior restraint because the
24 Attorney General's Office -- first, the Attorney
25 General's Office interprets Section 5.6 the same way

1 that the Secretary of State Office interprets it.

2 And the Court has not held that that interpretation
3 isn't constitutional.

4 So the Attorney General's Office is
5 required by statute to fulfill its responsibilities
6 of prosecuting any suspected violations of the New
7 Mexico Election Code. And that's what they're doing.
8 And the Court has never found -- and again -- I
9 mean -- and I've read the order, as I know all of us
10 have -- but the Court did not hold that the threat of
11 prosecution, first of all, is the issue. The Court
12 said that it was the Secretary of State's Office act
13 of making that threat public; that if they had not
14 done that somehow, there would have been a different
15 outcome.

16 But setting that aside, the Attorney
17 General's Office -- again, if there is no First
18 Amendment violation, there cannot be a prior
19 restraint. If there is no protected speech, there
20 cannot be a prior restraint.

21 THE COURT: All right. Anything else,
22 Ms. Serafimova?

23 MS. SERAFIMOVA: No. But again, Your
24 Honor, the Court has not found that our
25 interpretation of the statute is unconstitutional,

1 not the case here. 5.5 and 5.6, and our
2 interpretation of both of those sections, have not
3 been found to be unconstitutional. So, yes, the
4 Attorney General's Office has the statutory mandate
5 to enforce New Mexico law, including the Election
6 Code. And if we believe that a violation is
7 occurring -- "we" meaning the Attorney General's
8 Office -- yes, we are entitled and required to
9 prosecute. But, again, unless there is either an
10 unconstitutional statute or some other violation by
11 the Attorney General's Office of plaintiff's rights,
12 the Attorney General's Office simply cannot be
13 enjoined from doing its job. This is an issue of
14 comity, an issue of state rights.

15 The Attorney General's Office is an
16 independent entity under state law, under the New
17 Mexico Constitution and statutes. It has no control
18 over the Secretary of State's Office, and vice versa.

19 And by the way, the suggestion that there
20 has been political pressure from the Secretary of
21 State's Office on the Attorney General's Office,
22 that's where I was trying to lodge an objection, that
23 is not in the evidence. That is Mr. Greim's personal
24 opinion, and has no place in today's hearing or in
25 the record or in the Court's decision making process.

1 day.

2 (The Court was adjourned.)

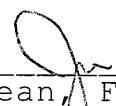
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4 C-E-R-T-I-F-I-C-A-T-E

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6 UNITED STATES OF AMERICA

7 DISTRICT OF NEW MEXICO

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10 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
11 Official Court Reporter for the State of New Mexico,
12 do hereby certify that the foregoing pages constitute
13 a true transcript of proceedings had before the said
14 Court, held in the District of New Mexico, in the
15 matter therein stated.

16 In testimony whereof, I have hereunto set my
17 hand on September 7, 2022.

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